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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 599

OTTO EISENSCHIML,
Petitioner,

vs.

FAWCETT PUBLICATIONS, INC.,
a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Otto Eisenschiml, petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case insofar as the judgment affirms the judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

OPINIONS OF THE COURTS BELOW.

The Memorandum Opinion of the United States District Court for the Northern District of Illinois, Eastern Division, entered April 26, 1956, and the judgment order of that court entered April 30, 1956, appear in full in the Record filed with and certified by the Clerk of the Court

of Appeals for the Seventh Circuit and transmitted herewith at pages 486 to 494 of the Record.

The opinion of the United States Court of Appeals for the Seventh Circuit (including the Dissenting Opinion of Judge Schnackenberg) is reported in 246 F. 2d 598 and is set forth in full on pages 1a to 13a of the Appendix to this petition.

The opinion of the Court of Appeals modified the District Court judgment by eliminating the provision therein requiring plaintiff to pay defendant's attorneys' fees. It limited the costs to be taxed against plaintiff incurred in the appellate court by reason of defendant's printing of unnecessary and repetitious matter in the appendix filed by defendant with its Brief in the Court of Appeals, in violation of the rules of that court. Otherwise, it affirmed the judgment of the District Court.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 17, 1957. A petition for rehearing filed by petitioner was denied on August 12, 1957, Judge Schnackenberg dissenting. The order denying rehearing is shown at page 14a of the Appendix to this petition.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. Section 1254(1).

QUESTIONS PRESENTED.

The following questions are presented by this appeal:

1. What is the meaning and intent of Rule 53(e)(2) of the Federal Rules of Civil Procedure—a rule never construed by the Supreme Court, and given grossly divergent construction in the several circuits?

2. Whether under the "clearly erroneous" doctrine of Rule 53(e)(2) of the Federal Rules of Civil Procedure,

an appellate court is bound by the conclusions and inferences drawn by the Master and District Judge from undisputed or palpably true evidentiary facts, or whether upon review an appellate court is free to draw its own conclusions from such facts.

3. Whether a court of appeals is bound under Rule 53(e)(2) of the Federal Rules of Civil Procedure by a finding of no substantial copying made by a Master and District Judge where defendant's own expert witness testified that out of the no more than 25,000 words contained in the alleged infringing article, "the borrowed material would not exceed some 5,000 words", 20% or more of the total, and where the Court of Appeals itself found numerous similarities, and where it found the writer's admissions of substantial copying and the appropriation of plaintiff's research.

4. Whether Rule 53(e)(2) precludes a searching review of an ultimate finding which is a determination of law and fact, where most of the evidence is documentary (including plaintiff's exhibit containing most of the basic evidence, admitted without objection and supported by an identical exhibit introduced by defendant).

5. What is or what constitutes fair use—a term never defined by the Supreme Court?

6. Whether a conclusion by the Master and District Judge that the use made by defendant of plaintiff's books was a fair use, is a finding of fact binding upon and not subject to review by an appellate court, or whether fair use is a mixed question of law and fact upon which an appellate court can pass judgment; or whether copying of copyrighted material can be a fair use if, admittedly, it was used in a non-scientific, non-artistic, popular article, which does not claim to advance science or the arts, and was written for strictly pecuniary gain.

7. Whether, after finding that the writer of the alleged infringing article "fully admitted that some of the material and ideas used by him in his article came from plaintiff's" books, an appellate court is still prevented from reversing the judgment of the District Court by reason of the "clearly erroneous" rule.

8. Whether the opinion of the Court of Appeals is inconsistent with and contrary to its own previous opinions and the decisions in other circuits.

9. Whether Section 8 of Article I of the Constitution of the United States, granting Congress the power "to promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries", and the Copyright Laws of the United States (17 U.S.C.) are to be disregarded and thwarted to allow a writer for a popular magazine to copy thousands of words, at least 20% of his article, from serious historical works written and copyrighted by plaintiff after eighteen years of "agonizing research" (to use the words of defendant's counsel) and the expenditure of more than $20,000.00 in cash.

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED.

1. Article I, Section 8, of the Constitution of the United States:

> "The Congress shall have the Power * * to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

2. Copyright Law of the United States (Title 17, U. S. Code, Secs. 1, 1a, 3, 101, 112, 116, 208, 209).

See pages 15a to 18a of Appendix to this Petition.

3. Rule 53(e)(2), Federal Rules of Civil Procedure:

"In an action to be tried without a jury, the court shall accept the master's findings of fact unless clearly erroneous. * *"

4. Supreme Court of the United States Rule 19-1(b).

STATEMENT OF THE CASE.

This is an action for damages and to enjoin infringement of plaintiff's copyrights in his two books "Why Was Lincoln Murdered?" (hereinafter usually referred to as *Why*) and "In the Shadow of Lincoln's Death" (hereinafter usually referred to as *Shadow*) by the book-length feature story "America's Greatest Unsolved Murder", written by Joseph Millard, which appeared in the February, 1953 issue of the magazine *True* published by defendant.

The evidence was heard by a Special Master in Chancery, who found the issues in favor of defendant. The District Court affirmed the Special Master's reports.

The Master's Report was written by him without considering nor having in his possession 15 of plaintiff's most important exhibits received in evidence. The Master in his Report states that he "examined the bulk" of the exhibits "during the hearing" and that he examined "appropriate portions of the transcript" dealing with "most of the exhibits".

The Court of Appeals found that "plaintiff's book 'Why Was Lincoln Murdered?' is a scholarly work extensively documented and foot-noted. It is a hard-covered book of five hundred three pages divided into twenty-nine chapters. It concerns the assassination of Abraham Lincoln, and a subsequent history of the persons involved. The hypothesis of the work is that Secretary of War Stanton

was implicated or at least had a guilty knowledge of the conspiracy."

At the bottom of the various pages of plaintiff's book *Why*, there are foot-note references to the original sources for statements made by the author in his book, such as manuscripts in public and private depositories, newspapers, periodicals, pamphlets, reports and books, some rare and difficult to get and scattered in various places throughout the country. Some of the foot-notes indicate that the originals are in the possession of plaintiff. These include the O'Beirne papers and various newspapers. Other foot-notes include acknowledgment to the copyright owners of the books used or those holding possession of the documents consulted.

The Court of Appeals found that "Plaintiff's second book 'In the Shadow of Lincoln's Death' is also a hard-covered book. It is four hundred fifteen pages in length and contains fourteen chapters. It is supplemented by extensive notations. One prominent reviewer described this book as a long foot-note to the earlier work 'Why Was Lincoln Murdered?'."

The latter book has fourteen chapters, acknowledgments, notes at the rear of the book and illustrations.

There are 66 Quotes referred to throughout the proceedings and marked accordingly in the two books and article as examples of copying. Later, other claimed parallels were also pointed out, bringing the total to about 140, in addition to the claimed over-all plagiarism and the appropriation of research — what defendant's counsel described as plaintiff's "agonizing research".

The work plaintiff did on *Why* took him about 18 years. He expended about $20,000.00 in cash. Some of the manuscripts, books, photostats, magazines and newspapers plaintiff had to acquire were expensive and rare and their acquisition required extensive correspondence and

research. For several years he paid wages to a secretary and assistants and to investigators in various cities from coast to coast.

Leading authorities on Abraham Lincoln, the Civil War and American history in general, such as Carl Sandburg, Dr. Paul M. Angle, Dr. Paul Buck, Dr. James G Randall and others, are in agreement that plaintiff is the outstanding authority on Abraham Lincoln's death and that his said two books "are packed with his own sensational discoveries", to quote Millard, the writer of the infringing article, himself.

Why is essentially different from all previous accounts of Lincoln's assassination in that the earlier books were conventional accounts largely in narrative form. They dealt with no mysteries, asked no questions, had no surmises or inferences, and were based on familiar factual material. *Why* reopens a supposedly closed chapter of Lincoln's death, as stipulated by defendant's counsel, by disclosing many new facts discovered by plaintiff, and dovetails them with known facts into a new and consistent pattern, which forms the main implied thesis—that the crime was not, as theretofore assumed, the deed of a half-crazed actor acting on his own behalf, but the result of a conspiracy in which high Washington officials were involved, possibly Secretary of War Stanton included.

Prior to the publication of plaintiff's *Why*, no suspicion on these various matters had been voiced by any historical writer.

Professor Paul Buck of Harvard, a Pulitzer-prize winner, wrote in the *Saturday Review of Literature*, March 27, 1937: "This is the most fascinating piece of historical detective work I have ever read. A book of

fiction half so baffling in denouement, and half so amazing in implication, would be classified as a phantasy. Yet this work is so serious in purpose, so honest in scholarship, and so completely documented, that it commands the utmost respect from the most meticulous student of history."

The main thesis of *Why* was then supplemented by plaintiff's second book, *Shadow*. In both books, unlike earlier Lincoln assassination books, questions are asked, inferences, surmises and conclusions reached. Plaintiff's books, while based upon sound scholarship and factual, are also full of mystery, suspense and excitement.

Certain of the more important parts claimed to have been plagiarized pertain to the life of John Parker, the Presidential guard, whose negligence was a contributing factor in the assassination of Lincoln. Plaintiff was the first and only person to publish the full story of Parker and the peculiar part he played in the tragedy. Plaintiff's work has been praised enthusiastically by Carl Sandburg and others as a highly original and important addition to the Lincoln story. He dug some of Parker's record from what are known as the O'Beirne private papers, which were in his exclusive possession. This included Mrs. Lincoln's letter to O'Beirne.

Millard had no access to this letter nor to the other O'Beirne papers at any time. They had never before been published, and their very existence was unknown to historians. The bulk of the Parker record was obtained, collected and arranged by plaintiff, after great effort and expense, from the files and statistical information of the Metropolitan Police Department of Washington, D. C., buried under an accumulation of unconnected files and records, dating from 1861 to 1933.

Millard admitted that he never examined any of the material at the Metropolitan Police Department of Washington.

The Court of Appeals found that "The Parker Story is an important part of Millard's article", found that he must have taken the story from plaintiff and not from Carl Sandburg as he claimed because there are parts of the story "used by Millard that were not used by Sandburg", and found that "This information came from plaintiff's books because Millard did not examine the original police records, and they had appeared in no other book or article prior to that time."

Neither Millard nor defendant ever asked or received permission to use any material from plaintiff's books. Nowhere in the published article is Eisenschiml credited or referred to. Defendant admitted that it should have credited Eisenschiml.

No effort of any kind was made by defendant prior to publication to check for possible copyright infringements in the article. The article was never submitted to any historical scholar or Lincoln authority, despite the recommendation of defendant's own editorial staff. No one checked on the sources and credits.

Following the publication of the February, 1953 issue of *True*, a number of persons, including students of Lincoln, called plaintiff's attention to the said publication, remarked upon the close similarities between it and plaintiff's two books, and asked plaintiff if the article was written by him under a pseudonym.

The Millard article constituted about 25% of the contents of the February, 1953 issue of *True* and was listed on the cover and in the table of contents as the main feature of that issue.

The February, 1953 issue of defendant's publication *True* was sold to the public at 25¢ per copy. There was a gross circulation of 1,898,285 copies, subject to returns, etc. The gross advertising revenue was $184,571.00 and the net was $156,865.85.

It was stipulated between the parties that the issues of damages and profits would be reserved until the Court shall have passed on the issues of infringement.

There is no issue as to defendant's access to the plaintiff's two books. Millard, the author of the article, admitted that he had read and was familiar with both books before writing the article, admitted he had read both books at least twice, and that *Why* was part of the preparation for his article.

Prior to filing his suit, plaintiff notified defendant of his claim that defendant had infringed his copyrights. Nevertheless, defendant continued to sell copies of the issue of *True* containing the Millard article.

Later defendant advertised this article again on the front cover of its issue of January, 1954 (Plaintiff's Exhibit 25), where facsimiles of the previous year's issues of *True* are displayed, with the infringing issue at the head of the page.

Millard testified by deposition only. As to his general attitude, his state of mind, and on the use of sources, he was asked, "* * * did you in many instances attempt to examine original sources?" To this he replied: "In all instances I attempted to. In many instances I was unable to without taking a lot of expensive trips to the places where that source material was." Such trips he did not take. He was asked with respect to matters that he thought were plaintiff's discoveries, if plaintiff was the first scholar to call them to his attention, and he replied: "That

is a fact." He was asked: "Did you understand at the time you wrote your article that you had the right to use any factual material found in copyrighted books without looking at original sources?", He answered: "I thought I had the right to." He thought, also, that he had the right to use any surmises or inferences. He was content to know that a source existed without actually examining it, and he was willing to take plaintiff's word without going to the source.

The Court of Appeals found that "In his testimony, Millard freely admitted that some of the material and ideas used by him in his article came from Plaintiff's *Why* or *Shadow*." The Court then listed several illustrations of Millard's answers in this regard, and indicated that there were others.

Millard was asked in direct examination by counsel for defendant: "Did you steal or pirate that from Dr. Eisenschiml?" To this question he replied, "I am rather afraid I did."

Millard's attention was called to a sentence consisting of 47 words, which had been deleted from, but which had been in, the manuscript as originally written and submitted by him to defendant for publication. Having copied that long sentence verbatim, word by word, from plaintiff's book *Why*, Millard admitted "That is a direct copy from Dr. Eisenschiml, of course, since I am quoting from him; not only the idea, but the language". He was quoting, but had no quotation marks and did not mention plaintiff there or elsewhere in the article.

Dr. Riddle, plaintiff's expert, himself a Lincoln authority and trained in the comparison of language, made a comparison of the language in the article with the language in plaintiff's two books, found passages in the

article identical with passages in plaintiff's books, marked on the margin of the article the points at which he observed similarity, and proceeded to underline instances of close similarity. On the basis of his study he found 85 instances of parallelism between the Millard article and the plaintiff's books. Of those 85 he found 13 in which there was identity of language of from 13 to 33 words. These he underlined in his copy of the Millard article. The 13 said instances of identical language are set forth on pages 140-141 of the Appendix filed with plaintiff's Brief in the Court of Appeals.

Dr. Riddle concluded that "the substance of the Millard article is derived from [the Eisenschiml books]".

There are 38 full or partial columns of text in the defendant's article. All but 4 of these 38 columns have parallels taken from Eisenschiml's books. 34 of the columns have between one and 10 plaintiff parallels, making over 136 parallels in all. 26 of the 38 columns have one or more of the 66 parallels, 30 of the 38 columns have one or more of the additional parallels, and 22 of the columns have parallels taken from the initial 66 as well as from the additional list.

In Millard's treatment of the characters in his article, he dealt with the same characters dealt with by the plaintiff and in the same fashion. When plaintiff quoted certain words from a letter or other source, Millard quoted exactly those particular words, and no others. When plaintiff omitted certain passages, for the sake of brevity or for any other reason, Millard made the same omissions.

When plaintiff underscored or emphasized, Millard did likewise. When plaintiff asked questions, or made comments, or drew inferences, Millard did the same, without variation.

Where plaintiff made an apparent mistake, Millard made it, too.

That the essence of plaintiff's books and defendant's article are the same is shown by the chapter by chapter, passage by passage, outline and analysis set forth in the record, in Plaintiff's Exhibit 20 and elsewhere.

Plaintiff offered in evidence, without objection by defendant, his Exhibit 7, containing much of the basic evidence establishing defendant's infringement of his copyrights, and defendant offered an identical document in evidence. Both were received in evidence by the master and then completely ignored by him.

Defendant's own expert witness, Dr. Samuels, testified that the borrowed material in the Millard article would not exceed 5,000 words. This would make the borrowing up to, according to him, 20% or more of the total article.

REASONS FOR GRANTING THE WRIT.

This case presents important questions of federal law involving the protection of every serious historian and biographer from unscrupulous or careless writers for popular and purely commercial magazines who can quickly copy and paraphrase into feature articles, for their own profit, the works of a historian who has spent a score of years in research and writing and thousands of dollars in wages and in the acquisition of original documents.

The decisions of the District Court and the Court of Appeals in this case, if allowed to stand, will destroy the very purpose of the Constitutional provision securing to authors the exclusive right to their writings. No serious historian's work will be safe from the piratical forays and pillages of those who, for profit, will not hesitate to appropriate another's effort and works. The useful

arts and sciences, the spread of knowledge itself, will be impaired irreparably and discouraged.

Rule 53(e)(2) of the Federal Rules of Civil Practice will have been so construed as to have turned a Master in Chancery into a court of last resort, depriving an appellate court of its right to draw its own inferences and conclusions which its findings reasonably induce from documentary or undisputed evidence.

In this case the bulk of the evidence is documentary and not in dispute. It consists principally of plaintiff's two books and defendant's magazine. Neither the master nor the District Judge observed the demeanor of the alleged infringer. He testified by deposition.

The master wrote his report without even having before him or in his possession 15 of plaintiff's important exhibits received in evidence and he ignored other evidence. By the master's own admissions in his report, his findings could not possibly be based on all the evidence. The sanction given by the Court of Appeals to the trial and to the master's report in this case requires the Supreme Court to exercise its power of supervision.

The alleged infringer, in varying statements, admitted copying. The Court of Appeals found that he must have appropriated the research to what it refers to as the "Parker story" and which it finds to be "an important part of Millard's article" and also cites many other portions.

The defendant's own expert witness testified that up to 5,000 words, 20% or more of the total article, were borrowed by Millard from plaintiff. Still, the appellate court held "there was not a sufficient amount of copying to amount to an infringement," after the master had somehow concluded that such amount of copying called "for

an application of the doctrine of *de minimus non curat lex.*"

The Court of Appeals, in its majority opinion, finds "that a number of extracts from plaintiff's works were used in Millard's article", cites the provisions of Rule 53(e)(2), yet decides that "we have concluded, that in view of the findings of the Master" * * and "of the District Court, that Millard did not substantially copy plaintiff's books".

In arriving at such conclusions, the opinion misconstrued the meaning, effect and intention of Rule 53(e)(2). In this case, there is no question but that Millard copied. That is an admitted and undisputed fact. Copying of up to 5,000 of the 25,000 words in Millard's article is shocking; Millard admitted copying; and the appellate court found that he copied.

The question here is, and before the Court of Appeals was, whether, as a matter of law, the nature and extent of the copying were substantial and actionable. The mere fact that the master and District Court found in the negative did not preclude the Court of Appeals from exercising its own judgment and making its own conclusions. But, that Court, because of its erroneous interpretation of the rule, having no Supreme Court decision as a guide, deemed itself bound by the conclusions of the Master.

It is important that certiorari be granted in this case:

A. In order that serious historians and biographers on one hand, and writers of material for commercial magazines on the other, be apprised by Supreme Court decision as to their respective rights, duties and liabilities towards each other;

B. In order that the publishing industry, generally, including writers, editors and publishers, have a guide

by way of Supreme Court decision, to determine what can and what cannot be borrowed from earlier writers;

C. In order that the publishing industry and writers generally, may be apprised by Supreme Court decision, as to the true meaning and implications of *fair use*, a term constantly used in the trade;

D. In order that the true meaning, purport and intent of the Rule 53(e)(2) of the Federal Rules of Civil Procedure be given expression by the Supreme Court and a guide created so that the *clearly erroneous* doctrine may have a fixed and definite meaning;

E. In order that the Supreme Court determine how much weight should be given to a master's findings made by a master who in his report admits that he did not examine all the exhibits and that he examined only appropriate portions of the transcript of the evidence; and in order that the Supreme Court may determine whether a Court of Appeals in holding itself bound by findings of such master has departed from the accepted and usual course of judicial proceedings.

The impact of the decision in this case has caused it to become the subject of discussion and review in a number of publications directed to the legal profession and to publishers and writers.

The importance of the issues in this case is demonstated by the fact that Publishers' Weekly, the American Book Trade Journal, the publishers' and writers' "Bible", has devoted two articles to the case, both written by Harriet F. Pilpel, a member of the law firm of Greenbaum, Wolff, and Ernst.

The first article (Vol. 171, No. 25, June 24, 1957) written before the Court of Appeals had filed its opinion, declares at page 53:

"In effect, this decision closes almost every possible claim for recovery by the historian except when his own original language is extensively used, or his organization of his material so closely paralleled that the defendant can rightly be called a 'copycat'."

The second article (Vol. 172, No. 9, August 26, 1957) states at page 33:

"There have been intimations that Dr. Eisenschiml now hopes to carry his claim to the United States Supreme Court. That Court has not recently spoken on the question of just what is plagiarism of factual material anyway, and a lot of us might be wiser—and safer—if it did. Research may not necessarily be 'plagiarism from two or more sources' as it has sometimes been defined, but there's just enough accuracy in the definition to leave a lot of us puzzled as to who can take how much copyrighted material for what purposes from where. It wouldn't be a bad idea for the Supreme Court to turn its attention to that."

The current edition of the American Bar Association Journal (October, 1957, Vol. 43, No. 10), in its "What's New in the Bar" section, deemed this case and the subject and issues involved worthy of publication, stating at page 939:

"In an unusual copyright infringement case the Court of Appeals for the Seventh Circuit, somewhat reluctantly and with one judge dissenting, has affirmed a special master's and district court's decision that two books written by a Lincoln-Civil War expert were not plagiarized by a free-lance magazine author's article in *True* magazine.

The plaintiff, Otto Eisenschiml, is a recognized authority, particularly in the specialized field of Lincoln's death, and his two books—*Why Was Lincoln Murdered?* and *In the Shadow of Lincoln's Death*—

have posited the hypothesis that Edwin M. Stanton was implicated in or at least had a guilty knowledge of the conspiracy to assassinate Lincoln. It was this theory that the magazine writer expounded in his article 'America's Greatest Unsolved Murder'.

The Court found the magazine article to contain character-treatments similar to Eisenschiml's and several paraphrases of his work. The magazine writer readily conceded that anyone writing of Lincoln's death would have to be familiar with the plaintiff's works; he admitted the similarities, to his chagrin, but he maintained that he had not copied.

While ideas are not protected by copyright, the Court declared, mode of expression and the association, arrangement and combination of ideas and thoughts and their form of expression may make a particular literary composition entitled to protection. It expressed sympathy with the plaintiff's contention that his work had been plagiarized, but it concluded that it could not hold that the master's and district court's conclusions to the contrary were clearly erroneous.

The dissenting judge thought the magazine article was a 'transparent and shocking piracy' and the master's findings were wrong.

(*Eisenschiml* v. *Fawcett Publications, Inc.*, United States Court of Appeals, Seventh Circuit, July 17, 1957, Duffy, J.)"

The Court of Appeals Misconstrued The Meaning, Purport And Intention of Rule 53(e)(2) Of The Federal Rules Of Civil Procedure.

The majority opinion of the Court of Appeals is based on the misapprehension that under Rule 53(e)(2) of the Federal Rules of Civil Procedure an appellate court is bound not only by the findings of fact but also by the inferences, deductions and conclusions put on such facts by the Master and District Court. That is not the law as repeatedly announced and applied in numerous cases.

Under the law, this rule does not operate to bind with finality the inferences and conclusions drawn by the master and District Court from its findings.

In this case about 90% of the evidence is documentary, and there is no question of credibility of witnesses, except insofar as the Court of Appeals questioned the credibility of Millard by finding that he had, contrary to his testimony, taken the Parker story and much more from plaintiff.

Millard's testimony was taken by deposition and his demeanor therefore was not observed by the master or District Court.

The documentary evidence consists principally of plaintiff's two books and defendant's magazine. In a case such as this, where the Court of Appeals, to arrive at a fair decision, would have to read or examine the depositions, the books and the magazine, and would necessarily have to do what the master and trial judge did or should have done, conclusions are to be drawn by the appellate court itself. Where the evidence is of such nature, the appellate court is just as capable as, if not more so, than the master or the District Court of making an independent examination of the record and drawing independent conclusions, deductions and inferences.

The Court of Appeals found that Millard was a plagiarist. It found that he pirated the whole of the Parker material,— material which it found to be "an important part of Millard's article." It found that he freely admitted copying. It gave a number of illustrations of Millard's answers admitting that he had copied. In connection with independent research, it found that "Millard did, to some extent, at least, use the material which resulted from plaintiff's research".

Nevertheless, despite such findings of copying and use of plaintiff's works by Millard, the majority of the Court of Appeals, obviously with reluctance, affirmed the master and District Court, Rule 53(e)(2) being its excuse.

The amazing admission of defendant's own expert witness that up to 5,000 words or the equivalent of 20% or more of the entire article of defendant was borrowed from plaintiff, is completely overlooked and not mentioned by the Court of Appeals, although argued in plaintiff-appellant's Brief filed in that Court.

The Court of Appeals rests its construction of the clearly erroneous doctrine on its own former opinion in *Ferroline Corp.* v. *General Aniline & Film Corp.*, 207 F. 2d 912 (C.C.A. 7th, 1953) and quotes from page 920 thereof to the effect that a master's findings of fact are binding on the trial court unless clearly erroneous, that the question in the appellate court is "the same as it was in the court below, whether, as a matter of law, the master's findings of fact were clearly erroneous" and that it cannot "refuse to recognize the findings 'merely because of a difference in personal persuasion * * or a dissatisfaction with the result reached'."

The Court, however, overlooked the fact that in the *Ferroline* case, it also said on page 920, as part of the above quotation, that the "court must respect the advantage enjoyed when he [the master] *saw* and *heard* the witnesses and was thus enabled to judge of their veracity and credibility". (Italics added).

That is not the situation here. The Master did not see nor hear the man charged with piracy. Millard's testimony was taken by deposition in New York out of the presence of the Master. The Master's conclusions as to Millard's testimony were gathered from that deposition

only, and the appellate court could and should have gathered, formed and rested on its own conclusions from that deposition.

And, the appellate court knew from the record and briefs before it that it was dealing with findings of a master who did not even bother to have 15 of plaintiff's admitted exhibits before him when he wrote his report. It knew it was concerned with findings of a master who (after plaintiff had objected to his original report) deemed it sufficient to state and did state in his "Final Report" that he "examined the *bulk*" of the exhibits "*during the hearing*" and that he examined "*appropriate* portions of the transcript" dealing with "*most* of the exhibits".

From such record and from such master's report, the Court of Appeals was bound to make its own deductions. A master who examined the *bulk* or *most* of the exhibits obviously did not examine all of them. A master who examined exhibits—those that he did examine—*during* a hearing, did so at the wrong time. A master who examined *appropriate* portions of the transcript did not examine all of it.

Such action or inaction by the master was a far departure from the accepted and usual course of judicial proceedings, and the sanctioning of such departure by the District Court and by the Court of Appeals calls for an exercise of the Supreme Court's power of supervision (Supreme Court Rule 19-1(b)).

The failure of the Court of Appeals, under such circumstances, to carefully and thoroughly search and review the record, and the acceptance by the Court of Appeals of this master's findings as being final and conclusive, is tantamount to an abdication of a judicial function.

The appellate court could and should have drawn its own ultimate inferences and conclusions from the entire record and from its own findings, irrespective of the conclusions drawn by this master and District Court. Certainly, the rules were never intended to limit the Court of Appeals by master's findings so made.

That inferences and conclusions of the master and trial court are not subject to the "clearly erroneous" rule (especially where made as in this case), but are matters upon which the reviewing court may exercise its independent judgment, is a principle firmly established. Facts *competently* found by the master should be taken as correct, but an appellate court is always free (and not bound as the Court of Appeals thought it was) to draw ultimate conclusions which the findings, especially its own findings, and its own precedents, reasonably induce, particularly where, as here, from the master's own actions and report *his findings could not be competent.*

The Court of Appeals having failed to do so, the Supreme Court should determine the weight to be given the report of a master who "has so far departed from the accepted and usual cause of judicial proceedings" (Supreme Court Rule 19-1(b)).

Judge Schnackenberg, in his strongly worded dissenting opinion, accusing Millard of "transparent and shocking piracy", correctly stated that "Even from those facts set forth in the majority opinion, it appears that the master and district court are clearly erroneous." (Citing Rule 53(e)(2)).

In the case of *Kuhn* v. *Princess Lida of Thurn and Taxis,* 119 F. 2d 704 (C.C.A. 3rd, 1941), the question was whether a finding by the trial court with respect to the reasonable compensation of an attorney for services ren-

dered was reviewable by the Court of Appeals without the restriction of the "clearly erroneous" provision as contained in Rule 52(a), the companion rule relating to findings in trials by the judge. Holding the rule inapplicable, the court stated, at pages 705-706, in language which since has been widely quoted:

> "The reason for the rule rests in large part upon the fact that the trial judge who hears the witnesses testify and observes their demeanor on the stand is better qualified to appraise the credibility of their testimony and to resolve the conflicts therein. * *
>
> "The rule does not operate, however, to entrench with like finality the inferences or conclusions drawn by the court from its fact findings. And, so, while accepting the facts competently found by the trial court as correct, an appellate court remains free to draw the ultimate inferences and conclusions which, in its opinion, the findings reasonably induce. * * Where the evidentiary facts are not in conflict or dispute the conclusions to be drawn therefrom are for the appellate court upon review of the trial court's action."

The *Kuhn* case has been applied in a variety of fact situations. See *Ball* v. *Paramount Pictures, Inc.*, 169 F. 2nd 317 (C.C.A. 3rd, 1948); *In Re Kellett Aircraft Corp.*, 186 F. 2nd 197 (C.C.A. 3rd, 1950).

In the *Kellett* case the principle was again reviewed and the court said, at page 200:

> "We are, as appellees urge, normally required to accept such findings of fact of the master as are confirmed by the District Court, if these findings are not clearly erroneous. This requirement includes a duty to accept also such purely factual inferences as are drawn by the master. But this rule refers to questions involving issues of credibility of witnesses

> or disputes as to basic facts. [Citing cases] . . . So far as the disposition of this case requires us to draw legal conclusions or inferences from undisputed facts, the rule is not relevant. We are as capable as either the master or the District Court of making a determination from the record before us * * *."

The determination of the term "substantial copying" in copyright cases can fairly be compared with that of "likelihood of confusion" in unfair competition cases. Both are conclusions to be drawn from the facts. In unfair competition cases, likelihood of confusion is the type of ultimate conclusion or inference which is held to be freely reviewable on appeal.

In *La Touraine Coffee Co., Inc.* v. *Lorraine Coffee Co., Inc.*, 157 F. 2d 115 (C.C.A. 2nd, 1946), the Court below had dismissed the complaint. In reversing, the Court of Appeals reached its conclusion on the issue of likelihood of confusion stating, at page 117:

> "While the trial judge, emphasizing the dissimilarity in size of the two businesses, concluded otherwise, we are constrained to think it is [*i.e.*, that confusion is likely]. As the cases cited below show, this is a question reviewable on appeal."

Likewise, in *Best and Co., Inc.* v. *Miller*, 167 F. 2nd 374 (C.C.A. 2nd, 1948), the same issue was presented, and the Court stated at page 377:

> "The trial judge correctly ruled that unfair competition is a question of fact, and the test is 'whether the public is likely to be deceived'. Applying this test he found no unfair competition. Such a finding is not conclusive on an appellate court, if it takes a different view as to the likelihood of deception."

Here, too, the finding [of no copying] was not conclusive on the appellate court. It took a different view

and found copying and should not have considered itself helpless by reason of Rule 53(e)(2).

Lack of independent research.

Contrary to the finding of the master and District Court that Millard's work was based on independent research, the Court of Appeals repeatedly found and showed how Millard had availed himself of plaintiff's research instead of using original and common sources, but somehow still thought it was bound by Rule 53(e)(2) to follow the master's and District Court's conclusions.

The Court of Appeals found that although "a large portion of Millard's article resulted from his independent work * *** it also is apparent, as hereinbefore indicated, that a number of extracts from plaintiff's works were used in Millard's article". From that finding, however, that Court refused to conclude that this is a situation requiring it to draw its own inferences and reverse the District Court's judgment.

To determine the extent of Millard's use or lack of use of common sources to make his work of only three and one-half months an independent work, as contrasted with plaintiff's twenty years, we need merely refer to his own testimony. He testified that in some cases he did not go to original sources, and that particularly he refrained from so doing where plaintiff's material was concerned. He leaned so much on plaintiff that he would not think of doubting him. He was content to know that a source existed, without actually going to it.

By independent research, Millard could have secured some of the information contained in his article from common sources. He could have gone to the same sources as plaintiff did and could have done his research inde-

pendently, but he did not. He simply appropriated plaintiff's "agonizing research".

In *Toksvig* v. *Bruce Publishing Co.*, 181 F. 2d 664 (C.C.A. 7th, 1950), the court held that in determining whether the defendant infringed the copyright of plaintiff, the question is not whether the defendant *could* have obtained the same information by going to the same sources, but rather whether defendant did actually go to the same sources and do his own independent research. At page 667 the court said:

> "The question is not whether Hubbard could have obtained the same information by going to the same sources, but rather did she go to the same sources and do her own independent research? In other words, the test is whether the one charged with the infringement has made an independent production, or made a substantial and unfair use of the complainant's work. *Nutt* v. *National Institute, Inc.*, 2 Cir., 31 F. 2d, 236, 237."

Millard had to exercise his own industry and do his own research. *Universal Pictures Co.* v. *Harold Lloyd Corp.*, 162 F. 2d 354, (C.C.A. 9th, 1947).

The proposition is well stated in the old case of *Gray* v. *Russell*, 10 Fed. Cas. 1035 (U.S. Cir. Ct. Mass., 1839) at page 1038:

> "There is no foundation in law for the argument, that because the same sources of information are open to all persons, and by the exercise of their own industry and talents and skill, they could, from all these sources have produced a similar work, one party may at second hand, without any exercise of industry, talents or skill, borrow from another all the materials, which have been accumulated and combined together by him."

The Copyright Laws were adopted to prevent writers such as Millard from claiming that just because some of the materials in plaintiff's books, scattered as such materials may be, are historical and *can* be brought together like plaintiff did, that research becomes unnecessary.

> "What would become of the elaborate commentaries of modern scholars upon the classics, which, for the most part, consist of selections from the words and criticisms of various former authors, arranged in a new form, and combined together by new illustrations, intermixed by them? * * * What would become of the treatises in our own profession. * * Blackstone's Commentaries is but a compilation of the laws of England, drawn from authentic sources, open to the whole profession; and yet it was never dreamed, that it was not a work, which, in the highest sense, might be deemed an original work; * * combined together in a new form, and in a new plan and arrangement; * *." *Gray* v. *Russell*, 10 Fed. Cas. 1035, 1038. (U. S. Cir. Ct. Mass., 1839).

As stated in *Ball's Law of Copyright and Literary Property* (1944), at page 244:

> "The law permits anyone to work upon the same original materials as those examined and utilized by another, if he collects them directly from original sources common to all, but he cannot save himself the time, effort and expense of original research by evasively using those already collected and embodied in a new work by the skill, industry and expenditures of another.
>
> "In some cases the originality of the subject matter and the purpose for which the work is designed may admit of little or no originality in the literal or artistic sense; wherefore such originality as it may possess must rest almost entirely upon the extent to which the author has independently resorted to the

> common sources open to all, without relying for his materials upon other copyrighted works treating of the same subject in substantially the same way and for the identical purpose."

The law therefore does not allow anyone to "save himself the time, effort and expense of original research". The Court of Appeals of our circuit emphasized its agreement with this doctrine in the *Toksvig* case by stating that "it is clear that Hubbard obtained much of value from the use in her work of many of the original concepts and ideas of plaintiff", and "was enabled to finish her book in less than one-third of the time that it took plaintiff". Yet in our case both of these factors were completely overlooked.

Millard wrote and defendant published an article that was neither original nor independent. The article being based on plaintiff's research, not Millard's, is pirated from plaintiff's copyrighted two books. "A number of extracts from plaintiff's works were used in Millard's article" and all of the Parker story, "an important part of Millard's article", were taken by Millard from plaintiff, but the Court of Appeals, erroneously believing itself limited under Rule 53(e)(2), reluctantly refused to reverse.

Millard appropriated the novel concepts, ideas, surmises, discoveries and interpretations of plaintiff's two books, and pirated their pattern and arrangement.

Millard's article follows the pattern and arrangement of and parallels the plaintiff's works. Without appropriating plaintiff's ideas and suppositions and architecture, style and design, that article would have been no more than any one of the numerous orthodox stories concerning Lincoln's assassination. Only by taking plaintiff's discoveries and

accepting the mysteries created by plaintiff, did Millard put together and have published "America's Greatest Unsolved Murder" as the leading article in defendant's magazine *True*. Defendant's own editor emphasized that the unexplained mysteries made the article sell.

It is these discoveries, mysteries, and literary composition that are the heart of plaintiff's books. Without them plaintiff would have had just another book dealing with the assassination. These are the things of value in the books, the things that made them saleable and valuable, the things that gave them distinct individuality, and it is these things of value that Millard appropriated, and that gave his article a degree of quality.

> "The question of infringement of copyright is not one of quantity but of *quality* and *value*." (Italics added)
>
> *Toksvig* v. *Bruce Publishing Co.*, 181 F. 2d 664 (C.C.A. 7th, 1950).
>
> *Ball, Law of Copyright and Literary Property*, (1944), page 335.

The master and District Court found that plaintiff's ideas and theories were historical facts which Millard could use. We do not contend that bare facts, news, theories or opinion, however original they may be, are covered by copyright, but we do contend, and the courts hold, that the association, arrangement, and combination of ideas and thoughts and their form of expression make a particular literary composition, the appropriation and use of which in such form, arrangement and combination constitute an infringement.

> *Holmes* v. *Hurst*, 174 U.S. 82, 49 L. Ed. 904 (1899).
>
> *Chicago Record-Herald Co.* v. *Tribune Assn.*, 275 F. 797 (C.C.A. 7th, 1921).

Although bare historical facts in the public domain are not copyrightable, the arrangement and treatment given the facts are copyrightable. Plaintiff's discoveries, and the arrangement given these facts by plaintiff were entirely novel, based on his own novel concepts. These concepts were appropriated by Millard.

Chicago Record-Herald Co. v. *Tribune Assn.*, 275 F. 797 (C.C.A. 7th, 1921).

International Film Service Co. v. *Affiliated Distributors*, 283 F. 229 (D.C., S.D. N.Y., 1922).

In *Chicago Record-Herald Co.* v. *Tribune Association*, 275 F. 797 (C.C.A. 7th 1921), the court said, at pages 798-799:

> "* * * in so far as the Edwards article involves authorship and literary quality and style, apart from the bare recital of the facts or statement of news, it is protected by the copyright law. * * *
>
> "This is plainly more than a mere chronicle of facts or news. It reveals a peculiar power of portrayal, and a felicity of wording and phrasing, well calculated to seize and hold the interest of the reader, which is quite beyond and apart from the mere setting forth of the facts. But if the whole of it were considered as stating news or facts, yet the arrangement and manner of statement plainly discloses a distinct literary flavor and individuality of expression peculiar to authorship, bringing the article clearly within the purview and protection of the Copyright Law."

Plaintiff's two books do not merely chronicle historical facts. The picture they portray and the words, phrases and manner in which they do so, make them interesting and entertaining reading in addition to merely setting forth facts. From the above quotation in the *Chicago*

Record-Herald case we submit, even if plaintiff's whole books were considered as stating historical facts, yet the arrangement and manner of statement and literary flavor and individuality of expression peculiar to authorship, bring the books within the protection afforded them by the Copyright Law.

The manner, form and expression of the treatment given the main characters, particularly Secretary Stanton, and the sequence of events are so alike in plaintiff's books and defendant's article that both portray similar emotions. Infringement is evident when the most important points of similarity between two stories indicate that the same use is made of the same series of events to excite the same emotions in the same sequence.

International Film Service Co. v. *Affiliated Distributors*, 283 Fed. 229 (D.C., S.D. N.Y. 1922).

In writing of the Lincoln assassination, Millard might have played up the assassin, Booth, or the victim, Lincoln, as other writers have done. We do not mean to infer that he could not write about or even implicate Stanton, but like plaintiff, he made Secretary Stanton the dominant and over-shadowing character in his article, in exactly the same and entirely novel manner as did plaintiff before him.

From the first page to the last there are continuous references to Stanton, all depicting him in the same dark light that plaintiff did, with the same incidents, epithets, tags of speech, innuendoes, questions, conversations and tell-tale language.

And what is true of Stanton is true of the other characters. The characterization of John F. Parker is copied from beginning to end. This the Court of Appeal found as a fact—built without the logical conclusion.

The Construction Given the Principle of Fair Use in this Case is Contrary to established Law and to Reason.

The Supreme Court ought now to define the term fair use. Fair use is an issue in almost all copyright infringement cases, but, unfortunately for sincere writers and fortunately for those who pirate their writings, the Supreme Court has never defined the term; and like fair-play in any business or sport, the term means different things to different men.

In this case although over 20 per cent of the whole article in question was taken, the taking up to this time still stands as one with *de minimus* standards with a fair use label.

Fair use is the usual excuse for copying, but the doctrine never applies when the defendant's publication, as here, is designed solely for monetary profit and commercial use. Because of the purely commercial nature of defendant's publication and the complete absence of any motivation remotely connected with the advancement of the arts or sciences, there could not possibly be a defense of fair use in this case. But, the Court of Appeals completely overlooked and misapprehended this principle of law.

Federal Judge Leon R. Yankwich, of the Southern District of California, in an article entitled "What is Fair Use?", published in the University of Chicago Law Review, Volume 22, No. 1, Autumn 1954, sums up the proposition briefly as follows, at page 209:

> "If * * * the appropriation * * * is motivated by the desire to derive commercial benefit, the use, regardless of quantity, is unfair." [Citing *Holt* v. *Liggett & Meyers,* 23 F. Supp. 302, (D.C., E.D. Pa., 1938)].

In *Loews, Inc.* v. *Columbia Broadcasting System,* 131 F. Supp. 165 (D.C., S.D. Cal., 1955) the Court adopted the above quotation and added, at page 176:

> "It was obviously made to point up the impact of commercialism on the doctrine of fair use. We would conclude that the *purpose for which the use was made* is of major importance * * * that broader scope will be permitted the doctrine where the field of learning is concerned and a much narrower scope where the taking is solely for commercial gain." (Italics added)

The Master correctly found that *True* "is a magazine for popular reader consumption" and that it is "rarely, if ever, cited or used for scholarly purposes * *."

A finding of fair use would necessarily be a *conclusion* deduced from the facts, and the Master concluded from the facts that Millard's use of plaintiff's works was *de minimus* and a fair one. The Court of Appeals, after first agreeing that "the question of a fair use usually arises in connection with scientific or other works dealing with a common subject matter" finds that the issue of fair use is one of fact, and that it is bound by the Master's findings in that regard. But, fair use is not a fact; it is something that must be deduced or inferred *from* the facts; it is a legal conclusion based upon the facts and more.

Here again the Court of Appeals misconstrued the meaning and intent of Rule 53(e)(2) and failed to recognize that since the Master's finding of fair use was a conclusion drawn by him from his findings of facts, it, the Court of Appeals, was completely free to draw and should have drawn such ultimate inferences and conclusions as in its opinion should be drawn in a case where over 20 per cent of the alleged infringing article was admittedly copied from plaintiff's books.

Broadening the concept of fair use so as to allow an article such as that herein involved to be published with the blessing of the courts is a dangerous precedent with limitless implications. The whole fabric of intellectual integrity may be destroyed thereby. Unless this court intervenes, defines fair use, and calls a halt to such outrageous literary theft, no serious writer is secure; not only plaintiff, but every historian and biographer and the public generally will suffer in the long run.

CONCLUSION.

The framers of the Constitution wisely gave protection to authors and inventors in order, as they stated, to promote the progress of science and the useful arts. This, as implemented by statute and the courts, has largely accounted for the vast technical and cultural advances of the United States. Those who labor day and night at great personal sacrifice, as plaintiff has done, to get the material for the creation of useful scholarly works are sustained by the foreknowledge that they may enjoy the fruits of their labor. When a publisher with vast economic resources for litigation is permitted, as here, to take away, through its hireling, the fruits of such labor, then a blow is struck against the spirit of honest endeavor. Why engage in "agonizing research" if any glib paraphraser can palm off as his own what you have created through the sweat of your brow?

By reversing the lower courts and by adjudicating that there has been an actionable infringement here, all writers of sober honest prose, and not alone plaintiff, will be assured that the Constitutional safeguards really prevail.

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

(Majority Opinion)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11830 September, 1956 Term—April, 1957 Session

OTTO EISENSCHIML,
Plaintiff-Appellant,
v.
FAWCETT PUBLICATIONS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 17, 1957

Before DUFFY, *Chief Judge*, and FINNEGAN and SCHNACKENBERG, *Circuit Judges*.

DUFFY, *Chief Judge*. The complaint herein alleges copyright infringement. Count I alleges defendant infringed plaintiff's copyrighted book "Why Was Lincoln Murdered?" (hereinafter sometimes referred to as "Why"). The second Count alleged the defendant infringed plaintiff's copyrighted book "In the Shadow of Lincoln's Death" (hereinafter sometimes referred to as "Shadow"). Plaintiff seeks an accounting for profits, damages and costs pursuant to the Copyright Act.

The defendant, Fawcett Publications, Inc., publishes a magazine called "True". Plaintiff alleges defendant infringed his copyright by publishing in the February, 1953, issue of True, an article entitled "America's Greatest Unsolved Murder" written by one Joseph John Millard. The cause was referred to a Special Master, although the oral testimony of only five witnesses was heard by him. He also considered three depositions including that of Joseph Millard, and examined numerous exhibits.

The Special Master made a report recommending that the Court enter judgment for the defendant, and that the plaintiff be taxed all costs including the payment of an attorney fee. He reported that the parties had deposited with the Master the sum of three thousand dollars for fees, and he requested an additional allowance of three thousand dollars. Exceptions were filed to the report. The District Court filed a short memorandum, and entered an order overruling objections to the report, ordering the plaintiff to pay the Special Master an additional sum of Forty-five Hundred Dollars and to reimburse the defendant in the amount of Fifteen Hundred Dollars for the sum which it had deposited with the Special Master. The Court also ordered that the plaintiff pay attorney fees. The amounts allowed by the Court were Fifteen Hundred Dollars more than had been requested by the Special Master; however, the latter has filed a partial satisfaction to the extent of Fifteen Hundred Dollars.

Plaintiff has written a number of articles and books on the Civil War period. He is an acknowledged authority in the field of Civil War history and, in particular, in the narrower field of Lincoln's assassination. His research on this subject extended over a period of eighteen years, and plaintiff testified he expended $20,000.00 in doing this

work. Millard testified no competent authority would write about Lincoln's assassination without studying plaintiff's works.[1] Millard read plaintiff's "Why" and "Shadow" at least twice before writing his article.

Joseph Millard has been a free lance author and writer for twenty-five years. He has penned and sold over one thousand stories to popular media. He has made a study of the Civil War period, and has accumulated a Civil War library containing many books, magazines and newspapers. At the time of his deposition he produced more than a hundred books from his library. Prior to writing the alleged infringing article he had written, and defendant had published, two earlier articles concerning the Civil War. The first was published by True in December, 1945, and was entitled "The Spy Who Saved the Union." The story concerned the exploits of one Felix Stidger, a counter-espionage agent who had exposed the dangerous Copperhead Society called "Knights of the Golden Circle." The second was published in the July, 1947 issue of True, and was called "The Devil's Errand Boy." This story concerned incidents in the life of Lafayette Baker, who was head of the Secret Service during the Civil War, and who was a one-time intimate of Secretary of War Edwin M. Stanton.

Plaintiff's book "Why Was Lincoln Murdered?" is a scholarly work, extensively documented and foot-noted. It is a hard-covered book of five hundred three pages divided into twenty-nine chapters. It concerns the assassination of Abraham Lincoln, and a subsequent history

[1] In his article "The Devil's Errand Boy" Millard referred to plaintiff as follows: "Mr. Otto Eisenschiml of Chicago, the outstanding authority on Abraham Lincoln's death, has devoted a lifetime of intensive research to the subject. His two books—'Why Was Lincoln Murdered' and 'In The Shadow of Lincoln's Death'—are packed with his own sensational discoveries. Yet he feels the surface has barely been scratched."

of the persons involved. The hypothesis of the work is that Secretary of War Stanton was implicated or at least had a guilty knowledge of the conspiracy. Twenty-two thousand copies of this work were sold.

Plaintiff's second book "In the Shadow of Lincoln's Death" is also a hard-covered book. It is four hundred fifteen pages in length and contains fourteen chapters. It is supplemented by extensive notations. One prominent reviewer described this book as a long foot-note to the earlier work "Why Was Lincoln Murdered?" Thirty-six hundred copies of this work were sold.

Defendant's article "America's Greatest Unsolved Murder" contains about twenty thousand words. It was the longest article and the main feature of the February, 1953 issue of True. The author originally entitled it "History's Maddest Murder Case." It contained no footnotes, bibliography or other documentation.

Neither defendant nor Millard ever asked or received permission to use material from plaintiff's books. Nowhere in the published article is Eisenschiml credited or referred to. The only such passage in the article as written by Millard was "Otto Eisenschiml, probably the world's leading authority on the mysteries of Lincoln's assassination, has in one curt sentence treated Stanton's diatribe to the respect which it deserves * * *." However, this passage was deleted from Millard's manuscript by defendant before publication in its magazine.

Two expert witnesses testified and, as so often happens, held diametrically opposed views. Dr. Donald Riddle is the head of the division of Social Science at the University of Illinois, Chicago Undergraduate Division at Navy Pier, and teaches American history. He has written books on Lincoln's Congressional career. He has done extensive

work in studying and determining the textual history of the New Testament which included comparing the various Gospels' language to determine literary relationships. In Dr. Riddle's opinion, defendant's article is a literary copying of the Eisenschiml books here in question.

Dr. Ernest Samuels is a professor of English at Northwestern University. He has served as editorial adviser upon matters of style and scholarship for various publishers. He has written an historical biography "The Life of Henry Adams." One of his duties at the University has been to sit as a one-man court of review when students are accused of copying their English themes. He spent seventy-five to eighty hours analyzing the three works here under consideration. His opinion was that Millard's article was an independent literary creation.

Plaintiff insists Millard's article is a slavish imitation, paraphrase and copy of substantial portions of his two copyrighted books, and that defendant, through Millard, substantially appropriated his research. Eisenschiml claims that Millard's article contains substantially the same treatment of and language about Stanton, Lincoln, the Grants, John F. Parker, O'Beirne, Miss Harris and Major Rathbone, John Fletcher and Atzerodt as in the Eisenschiml books, and that said named persons are the principal characters in the Millard article as in the infringed portion of the Eisenschiml books. Plaintiff contends that Millard's article follows the same general outline or pattern as the plaintiff's two books, and that he treats the material therein in the same manner as does plaintiff.

Plaintiff insists Millard's article not only pirated the underlying theme of plaintiff's books,—the theme that Secretary of War Stanton may have been implicated in the assassination, that obstacles were deliberately placed

in the way of Booth's capture, and that there are other unexplained mysteries — but the article treats the ideas, characters, scenes and events in the same way that plaintiff does. Plaintiff further states Millard's article so parallels and simulates plaintiff's two books that the article is actually a condensation of several chapters of Why with portions taken from Shadow plus some standard historical data.

Exhibit 7 received by the Master contained what plaintiff claimed were sixty-six parallels or quotes designed to show copying and paraphrasing by Millard of plaintiff's two books. The limitation of space will not permit more than a brief illustration of the quotes.

At page 56 of Why, plaintiff wrote: "In his memoirs, Grant passed over this episode quickly and skillfully * * *." Millard, referring to the same matter, wrote "In his memoirs, Grant skillfully slid over the incident * * *."

At page 73 of Why, plaintiff wrote: "* * * L. A. Gobright, agent of the Associated Press at the Capitol * * * was about to close his office * * * when he was informed of the tragedy. Rushing to the telegraph office, he sent a short special * * * he tore over to Ford's Theatre * * * and was fortunate enough to find Booth's derringer on the floor." Millard wrote: "One L. A. Gobright of the Associated Press was just closing his Washington Office when the terrible news came. Rushing out, he quickly wired his paper * * * From there, Gobright hurried to Ford's Theatre for more details. He was in the blood-spattered box when the man named Kent found the derringer on the floor."

In Why, at page 120, plaintiff quoted from the O'Beirne diary. The O'Beirne papers were in plaintiff's exclusive possession. Millard quoted exactly the same passage. The

comments following this quotation were as follows: Plaintiff said: "That close O'Beirne came to getting his man." Millard wrote: "That close O'Beirne came to making the capture then."

In Shadow, plaintiff wrote at page 55: "What can be the meaning of this? A dying man hears his name mentioned. He opens his eyes and acts surprised." Millard wrote: "Would a dying man be surprised at hearing his own name spoken?",

On page 71 of Shadow, plaintiff wrote: (Baker) smiled, and said "I intended to have his body, dead or alive, or a mighty good substitute for it." Millard wrote: "* * * Baker, grinning harshly, would soon be remarking to a friend, 'I intended to have his body, dead or alive, or a mighty good substitute for it.'"

In Why, at page 29, plaintiff refers to "The great scoop of the century * * *." Millard refers to the same subject matter as "The newsbeat of the century * * *."

On page 419 in Why, plaintiff wrote: "Mrs. Lincoln, frightened and distracted, had fallen to the floor in a faint. A sudden rage possessed Stanton. Brutally he gave orders to take 'that woman' out of the room and not to let her come back." Millard wrote: "When Mrs. Lincoln, half mad with grief and shock, fainted at the sight of her husband, Stanton waved his arms, bawling, 'Take that woman out of here.' Get her out and don't let her come back!'"

Items in the career of the dissolute policeman, John Parker, who was Lincoln's bodyguard on the fatal night, were assembled by plaintiff from private papers of a Provost Marshal named O'Beirne, and from old and scattered records and archives of the Washington, D. C. police department. Millard could not have examined the

O'Beirne files as they were in plaintiff's possession. It is admitted Millard did not examine the Washington police files.

The Parker story is an important part of Millard's article. When Carl Sandburg was writing "Abraham Lincoln, the War Years" he requested and received permission from plaintiff to incorporate the Parker story in his work. In his foreword in Volume I he wrote: "The liberal researches of Otto Eisenschiml on the closing scenes of Lincoln's life are a distinct contribution; * * *"

Millard claims he received part of the Parker story from Sandburg's work. However, there are some parts used by Millard that were not used by Sandburg. The incident of the squawking ducks on the street car; the incident of Parker firing a pistol through a window of a house of ill fame; and the incident of Parker being severely kicked and injured by a man he was attempting to arrest, all of which were included in Millard's article, were not included in the Sandburg work. This information came from plaintiff's books because Millard did not examine the original police records, and they had appeared in no other book or article prior to that time.

In his testimony, Millard freely admitted that some of the material and ideas used by him in his article came from plaintiff's Why or Shadow. The following are illustrations of a number of his answers: "That, I believe, was queued to me by Dr. Eisenschiml's book"; 'Oh, I got some of it from the Eisenschiml books"; "The thought was undeniably inspired by Dr. Eisenschiml"; "The idea, I think, is an inspiration of Dr. Eisenschiml"; "The idea, I think, I can positively state, was Dr. Eisenschiml's"; "The material, I think, came from Dr. Eisenschiml."

Millard's attention was called to a portion of his manuscript and he was asked to compare same with portions

of plaintiff's Why. He testified: "It just shocks me a little. I did not get the language consciously from Dr. Eisenschiml, whether unconsciously I could not say. • • • It is not a copy, but there is a similarity there, and a rather shocking one to me."

It is apparent Millard did, to some extent, at least, use the material which resulted from plaintiff's research. In *Toksvig* v. *Bruce Publishing Company*, 181 F. 2d 664, 667, this Court said: "The question is not whether Hubbard could have obtained the same information by going to the same sources, but rather did she go to the same sources and do her own independent research? In other words, the test is whether the one charged with the infringement has made an independent production, or made a substantial and unfair use of the complainant's work. *Nutt* v. *National Institute, Inc.*, (2 Cir.) 31 F. 2d 236, 237."

But the Master and the District Court that whatever use Millard may have made of plaintiff's work is not actionable "because it was an insignificant use, a fair use or use of non-copyrightable material." The Master and the Court also found the work of Millard "is an independent literary creation based upon independent research." The District Court said: "Not only Millard's sworn word, but all the circumstances, indicate clearly that he did not copy from the plaintiff."

Rule 53(e)(2) Federal Rules of Civil Procedure provides: "In an action to be tried without a jury the Court shall accept the Master's findings of fact unless clearly erroneous." In *Ferroline Corp.* v. *General Aniline & Film Corp.*, 7 Cir., 207 F. 2d 912, at page 920 this Court said: "Findings of fact by a master are binding on the trial court unless clearly erroneous. • • • The threshold ques-

tion here then is the same as it was in the court below,—whether, as a matter of law, the master's findings of fact were clearly erroneous. • • • Neither the trial court nor this one may refuse to recognize the findings 'merely because of a difference in personal persuasion • • • or a dissatisfaction with the result reached.' "

The Master found that Millard did not copy but that he worked independently. We agree that a large portion of Millard's article resulted from his independent work. But it also is apparent, as hereinbefore indicated, that a number of extracts from plaintiff's works were used in Millard's article. "• • • an infringement is not confined to literal and exact repetition or reproduction; it includes also the various modes in which the matter of any work may be adopted, imitated, transferred, or reproduced, with more or less colorable alterations to disguise the piracy. Paraphrasing is copying and an infringement, if carried to a sufficient extent." 18 C.J.C., Copyright and Literary Property, p. 217. This Court, quoting with approval from Ball on Law of Copyrights said in *Toksvig* v. *Bruce Publishing Company,* 181 F. 2d 664, at 667: "The question of infringement of copyright is not one of quantity but of quality and value."

Ideas, as such, are not protected by the law of copyright. *Holmes* v. *Hurst,* 174 U.S. 82; *Kalem Company* v. *Harper Brothers,* 222 U.S. 55. But the mode of expression used by the author can be protected. *Dymow* v. *Bolton,* 11 F. 2d 690. The association, arrangement and combination of ideas and thoughts and their form of expression may make a particular literary composition which is entitled to protection. *Holmes* v. *Hurst,* 174 U.S. 82; *Chicago Record-Herald Co.* v. *Tribune Association,* 7 Cir. 275 F. 797.

The question before us is did Millard make a substantial copy of plaintiff's books? *Mazar et al.* v. *Stein, et al.*, 347 U.S. 201, 218. We must keep in mind that copying is not necessarily a literal or exact repetition or reproduction. The answer is not entirely free from doubt. However, we have concluded, in view of the findings of the Master, and the findings in the memorandum opinion of the District Court, that Millard did not substantially copy plaintiff's books,—in other words, we conclude that the findings of fact in this respect were clearly not erroneous.

Whatever we may think of the ethics of Millard in utilizing various portions of plaintiff's works with only a scant credit reference, or the ethics of the defendant in publishing the article after first eliminating the credit reference, *we conclude in view of the findings, we must hold there was not a sufficient copying to amount to an infringement.*

The Master found that such use as Millard did make of plaintiff's books was a fair use. If so, such use was a non-infringing use. The question of a fair use usually arises in connection with scientific or other works dealing with a common subject matter. 18 C.J.S., Copyright and Literary Property, page 223. In historical writings such as the events immediately before and after President Lincoln's assassination, plaintiff and Millard were, necessarily, writing about the same personages during a very limited period of time. It is to be expected that there would result some similarity of treatment. In any event, the issue of fair use is a question of fact. *Mathews Conveyer Co.* v. *Palmer-Bee Co.*, 6 Cir., 135 F. 2d 73, 85. We cannot say that the Master's finding in this respect is clearly erroneous.

We consider the award of attorney fees by the District Court to be an abuse of discretion and entirely unwarranted. True, the Master and the District Court were of the opinion that plaintiff's case was entirely without merit. However, we have indicated our view to the contrary. We have pointed out that a very close question was involved, and we hold that plaintiff should not be assessed attorney fees for trying to protect the copyright on his books. The provision in the judgment requiring plaintiff to pay attorney fees must be eliminated. *Official Aviation Guide, Inc.* v. *American Aviation Associates, Inc., et al.*, 7 Cir., 162 F. 2d 541.

Criticism must also be made of the size of the record before the Master. In spite of repeated objections by plaintiff the time of the trial was unnecessarily prolonged.

Rule 16(c) of this Court provides: "* * * It is expected that the parties will not indulge in unnecessary or repetitious printing, having in mind the fact that the record is always available to the court for reference or examination. Infractions of this rule may be penalized by the denial or award of costs." Plaintiff's appendix contained 505 pages. Defendant filed a separate appendix containing 798 pages. Defendant's appendix contained much unnecessary and repetitious testimony. Defendant may include in its Bill of Costs the printing of only 400 pages of its separate appendix.

Modified as hereinbefore indicated, the judgment is

AFFIRMED.

SCHNACKENBERG, *Circuit Judge*, concurring in part, and dissenting in part.

I concur in Judge Duffy's opinion insofar as it disapproves the assessment of attorneys' fees against plaintiff.

Insofar as the opinion upholds the district court's finding and judgment on the merits of the case, I dissent. Even from those facts set forth in the majority opinion, it appears that the findings of the master and the district court are clearly erroneous. Rule 53(e)(2) Federal Rules of Civil Procedure. An examination of all the evidence in the record convinces me of Millard's transparent and shocking piracy of plaintiff's publications. For the wrongful and clearly established infringement, I would grant relief to this researcher and author.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
Monday, August 12, 1957

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. Philip J. Finnegan, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

No. 11890

OTTO EISENSCHMIL,
Plaintiff-Appellant,
vs.
FAWCETT PUBLICATIONS, INC.,
Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered that the petition for rehearing in this cause be, and the same is hereby denied.

This Order of denial is by Judges Duffy and Finnegan. Judge Schnackenberg voted in favor of granting petition for rehearing.

COPYRIGHT LAW OF THE UNITED STATES. (Title 17 U.S.C.).

Section 1. Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish copy, and vend the copyrighted work; * * *

Section 3. The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title. * * *

Section 101. If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) To an injunction restraining such infringement;

(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow

the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of $200 nor be less than the sum of $50, and in the case of infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of $100; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of $5,000 nor be less than $250, and such damages shall in no other case exceed the sum of $5,000, nor be less than the sum of $250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him. • • •

(c) To deliver up on oath, to be impounded during the pendency of the action, upon such terms and

conditions as the court may prescribe, all articles alleged to infringe a copyright;

(d) To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order. • • •

Section 112. Any court mentioned in section 1338 of Title 28 or judge thereof shall have power, upon complaint filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by this title, according to the course and principles of courts of equity, on such terms as said court or judge may deem reasonable. Any injunction that may be granted restraining and enjoining the doing of anything forbidden by this title may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative throughout the United States and be enforceable by proceedings in contempt or otherwise by any other court or judge possessing jurisdiction of the defendants. • • •

Section 116. In all actions, suits, or proceedings under this title, except when brought up or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs.

Section 208. The Register of Copyrights shall provide and keep such record books in the copyright office as are required to carry out the provisions of this title, and whenever deposit has been made in the copyright office of a copy of any work under the provisions of this title he shall make entry thereof.

Section 209. In the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, * * *. In the case of a book, the certificate shall also state the receipt of the affidavit, as provided by section 17 of this title, and the date of the completion of the printing, or the date of the publication of the book, as stated in the said affidavit. The Register of Copyrights shall prepare a printed form for the said certificate, to be filled out in each case as above provided for in the case of all registrations made after July 1, 1909, and in the case of all previous registrations so far as the copyright office record books shall show such facts, which certificate, sealed with the seal of the copyright office, shall, upon payment of the prescribed fee, be given to any person making application for the same. Said certificate shall be admitted in any court as *prima facie* evidence of the facts stated therein. In addition to such certificate the register of copyrights shall furnish, upon request, without additional fee, a receipt for the copies of the work deposited to complete the registration.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 599

OTTO EISENSCHIML,
Petitioner,

vs.

FAWCETT PUBLICATIONS, INC., A CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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December, 1957.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 599.

OTTO EISENSCHIML,

Petitioner,

vs.

FAWCETT PUBLICATIONS, INC., A CORPORATION,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

The plaintiff's complaint for copyright infringement (App. 10 *et seq.*) raised the factual question of whether or not there had been a substantial copy of his two books. After issue was joined (App. 14-16), the plaintiff asked that the cause be heard by a Master in Chancery (Add. App. 10-11);[1] a reference was made over and despite the objection of defendant respondent (Add. App. 12-13).

[1] "Add. App." refers to defendant-respondent's appendix.

The Master appointed held extensive hearings receiving voluminous testimony from: the plaintiff, plaintiff's research assistant, two literary experts, and defendant's story editor. Additionally, the Master accepted in evidence some fifty exhibits, a deposition (550 pages) of respondent's author, and a deposition of respondent's Executive Vice President. After reviewing this mass of material, the Master made detailed findings of fact (App. 323-347) and concluded therefrom that the plaintiff's case "lacks any merit whatsoever." The Master found the defendant innocent of copying; he also expressly found that the facts in evidence disclosed respondent had made a "fair use" of plaintiff's works and that plaintiff had by his affirmative conduct dedicated a substantial portion of his allegedly copyrighted material to the public at large (App. 344-346).

The plaintiff filed detailed objections to the Master's report with the District Judge (App. 349-473). The Court then made a completely independent examination of the record (App. 486-491; compare 323-347) filing a separate written opinion affirming the Master in all respects (App. 486-491). He too specifically found that the plaintiff's case totally lacked merit. Appeal was then made to the Court of Appeals below. As that Court's opinion shows,[2] the sole issue presented to and determined by it was that the findings of fact were supported by the evidence in the record.[3]

[2] Pursuant to the Court's rules the Petition appends a purportedly true and correct copy of the opinion below. The petition however has italicized portions of the Court's opinion not so italicized in the official report (Compare 246 F. 2d 598, 603 with Appendix to Petition, page 11a).

[3] The briefs filed by both parties in the Court below were the maximum number of pages (75) permitted by the rules. Plaintiff's statement of facts was 17 pages and its argument of the contents and import of the record consumed practically the remainder of his brief. Respondent's brief contained a factual statement of 29 pages; its argument was also devoted primarily to the significance of the record.

The Court of Appeals after making a study of the record concluded the Master's findings were based upon the evidence and not "clearly erroneous" within the meaning of Rule 53 of the Federal Rules; the Court of Appeals' analysis, however, revealed that the factual questions petitioner presented were sufficiently close to exculpate him from paying respondent's attorney fees. An unsuccessful petition for rehearing occasioned a second reading of the record by the Court of Appeals and became the fourth analysis of the evidence now had in this cause.

ARGUMENT.

We oppose the petition for certiorari. The petitioner totally fails to demonstrate the existence of a single prerequisite for review by this Court. Instead he is here asking for another hearing upon his factual claims. The petitioner has now had four separate hearings upon the facts of the instant record; he has not and cannot show any grounds for being accorded still another determination. The petition falls precisely within this Court's long-established interdiction against reviewing *de novo* the correctness of lower tribunal findings of fact. *U. S.* v. *Yellow Cab Co.*, 338 U. S. 338; *Timken Co.* v. *U. S.*, 341 U. S. 593. We ask that the writ not be granted.

Petitioner contends the Court should accord review here because the Court of Appeals has misapprehended Rule 53 in that it allegedly accepted the Master's findings without a thorough search and review of the record; it is urged that the Court of Appeals' purported failure to do so was "tantamount to an abdication of a judicial function." Petitioner is clearly in error as to the nature of the review below; had the Court of Appeals either blindly followed the Master or "abdicated" its judicial function it would not have determined that petitioner's claims presented close factual questions entitling him to a modification of the District Court order concerning attorney's fees. Even the dissenting opinion, so heavily cited by petitioner, in nowise takes issue with the majority's application of Rule 53 but, instead, simply differs with it on the significance of the record's contents. Petitioner's claim of an alleged misconstruction of Rule 53 is simply a vehicle for arguing the facts anew, the fashion in which he purports to demonstrate the Rule's misapplica-

tion by the Court below (Petition, p. 25, *et seq.*) clearly so reveals.

Petitioner also urges the opinion below manifests a misunderstanding of the law of "fair use" because it permitted a popular magazine to make the defense; it is urged that there is now great need for this Court to express its views upon this doctrine of copyright law.[4] The doctrine of fair use has, however, long been recognized as pertinent and appropriate to popular writings as well as to serious works. *Shapiro, Bernstein & Co.* v. *Collier & Son*, 26 U. S. Pat. Q. 40; *Broadway Music Corp.* v. *F-R Publishing Corp.*, 31 F. Supp. 817; *Karll* v. *Curtis Publishing Co.*, 39 F. Supp. 836. Holdings defining and applying the doctrine in all areas of writing are also legion: *Crume* v. *Pacific Mut. Life Ins. Co.*, 140 F. 2d 182; *Mathews Conveyor Co.* v. *Palmer-Bee Co.*, 135 F. 2d 73; *Toksvig* v. *Bruce Pub. Co.*, 181 F. 2d 664; *Henry Holt & Co.* v. *Liggett & Myers*, 23 F. Supp. 302; Ball, *The Law of Copyright and Literary Property*, Sec. 125, and accordingly the critical need for an additional decision on the subject by the Court is not apparent and, we submit, nonexistent. Indeed, in view of the fact that the question of a fair use always hinges upon a determination of whether a particular author has been "fair" to a prior author in light of all relevant circumstances,[5] it is difficult to comprehend the basis

[4] Although the petitioner's claim for certiorari is in large part bottomed upon the Court of Appeals affirmance of the finding of fair use, it is manifest that this holding was not the sole predicate for the decision below. The Master and District Court also explicitly found that the respondent's story was not a substantial copying of petitioner's books; this finding was likewise approved and sustainable from the record.

[5] The factors taken into account in determining whether a particular author has been "fair" are succinctly set forth in *Mathews Conveyor Co.* v. *Palmer-Bee Co.*, 135 F. 2d 73, 85:

"Fair use is to be determined by a consideration

for petitioner's claim that there is compelling necessity for a decision by this Court that respondent was here either "fair" or "unfair".

Petitioner cites two popularly written commentaries of this case as support for his request of review. The status and relevance of such authority is indeed questionable, particularly when there is absolutely no indication that the writers of either of the fragmentary commentaries possessed and read any of the instant record. So also, petitioner's concern for the possible import of his adverse decision below upon the literati is groundless. Since the instant suit was clearly decided solely upon the particular facts of this case, the holding below is of no precedent whatsoever as between subsequent copyright litigants contesting even the identical issues. Moreover, all of the three opinions below (App. 323 *et seq.*, App. 346 *et seq.*, App. to Petition 1 a *et seq.*) are in exact accord with the many decided cases that have explicitly passed upon the problem of purported infringement in writings of either history or other real life events. *International News Service* v. *Associated Press*, 248 U. S. 215, 234; *Funkhouser* v. *Loew's*, 208 F. 2d 185; *Oxford Book Co.* v. *College Entrance Book Co.*, 98 F. 2d 688, 691; *Kane* v. *Pennsylvania Broadcasting Co.*, 73 F. Supp. 307;

> of all of the evidence, and among other elements entering into the determination of the issue, are the extent and relative value of copyrighted material, and the effect upon the distribution of objects of the original work. *New York Tribune, Inc.* v. *Otis & Co.*, D. C. N. Y., 39 F. Supp. 67. Whether a particular use of a copyrighted article, without permission of the owner, is fair use, depends upon the circumstances of the particular case and *the court must look to the nature and objects of the selections made, the quantity and value of material used, and the degree in which the use may prejudice the sale, diminish the profits, or supersede the objects of the original work. Karll* v. *Curtis Pub. Co.*, D. C. Wis., 39 F. Supp. 836." (Italics ours.)

Collins v. *M. G. M.*, 106 F. 2d 83, 86; *Seltzer* v. *Sunbrock*, 22 F. Supp. 621. See also *Decks* v. *Wells*, 1 Dom. Law Rep. 353. The suggestion that the literary world has particular concern with the decision below is thus without foundation and is, we submit, simply a reflection of petitioner's labored searching for some ground upon which to base his plaint for certiorari.

Conclusion.

We believe the petition has clearly not presented any accepted or adequate basis for the granting of certiorari. We respectfully request the petition be denied.

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December, 1957.